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No. 386

In the Supreme Court of the United States

October Term, 1935.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

REPLY BRIEF OF APPELLANTS.

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NEILL C. MARSH, JR.,
JOE K. MAHONY,
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vs.

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Appeal From the Supreme Court of the State of Arkansas.

REPLY BRIEF *of* APPELLANTS.

We shall adhere to the arrangement of our original brief by dividing this brief into two parts, Part I dealing with the jurisdiction of this court and Part II with the merits of the case.

PART I.

Jurisdiction.

It is contended by appellee that it is not necessary for this court to decide the constitutionality of section 7137, Crawford & Moses' Digest of the Statutes of Arkansas,

for the reason that there is another statute, section 7144 of the same Digest, which is in substance the same as section 7137, and which section has not been drawn in question and its validity has not been determined by the Arkansas Supreme Court. Passing the novel suggestion that the jurisdiction of this court can be avoided by showing that the state Supreme Court failed to mention a statute not distinguishable from the one adjudged valid, it is sufficient to say that the state Supreme Court treated section 7137 as the statute applicable to the facts of this case and based its decision upon the validity of that statute. Assuming that the state court could have avoided a decision of the constitutionality of section 7137 by merely saying that section 7144 was also applicable and its validity had not been challenged, it did not do so, and it is not for this court to say that the state Supreme Court need not have decided the constitutionality of section 7137. The authorities cited on page 29 of appellants' original brief are applicable. See also *Nickey* v. *Mississippi*, 292 U. S. 393, 78 L. ed. 1323, and *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, cited and quoted on page 10 of appellants' original brief. Moreover, we have never heard of a court refusing to pass upon the constitutionality of a certain statute because of the fact that there existed another statute not distinguishable in its application which had not been specifically challenged. The suggestion that a court would do such a thing is an imputation that courts are more hypertechnical than we have any reason to believe they are in these modern times. If one of the statutes is unconstitutional the other is also, and, rather than avoid passing upon one because the other had not been specifically challenged, it is probable that the court would either do as the Arkansas court did here and treat

the one statute as the applicable one and pass upon its validity, or uphold or nullify both statutes. Counsel for appellee did not suggest to the Supreme Court of Arkansas that it was not necessary to decide the validity of section 7137 because of the fact that section 7144 was not challenged, but, as stated by the state Supreme Court, they contended that the validity of section 7137 should not be determined because of the fact that "this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea." (R. 89, 90, appellants' original brief, pages 7 and 8.) The proper place to have raised that question was in the state court and not here.

Moreover, there is ample reason why the state Supreme Court could not have said that section 7144 was applicable to the facts of this case, and that is because the act, by its express terms, is applicable to every corporation "except while engaged in interstate commerce." It may be that the state court, if the question had been presented to it, would have said that it could not say from the record before it that appellant was not engaged in interstate commerce. Certainly there is no evidence that it was not, and plaintiff's complaint does not allege that it was not. If he had intended to rely upon that section of the statute, *it would have been incumbent upon him to allege that appellant was a corporation not engaged in interstate commerce.* Section 7137 is the only statute applicable to the issues formed by the pleadings and the evidence, and only that portion of that statute relating to "all corporations of every kind and character" is applicable. Moreover, all parties and the state courts treated that statute as the only applicable one, and

it was suggested in this court for the first time that section 7144 might have been applied. That the decision of the state Supreme Court would have been the same had section 7144 been considered applicable and challenged is conclusively shown by the fact that the court, in sustaining section 7137, cited its own decision in the case of *Postal Telegraph-Cable Co.* v. *White,* 190 Ark. 365, 80 S. W. (2d) 633, upholding section 7144 as against the contention that it violated the Fourteenth Amendment to the Constitution of the United States. (R. 90; and see quotation from *Postal Telegraph-Cable Co.* v. *White,* page 8, appellants' original brief.)

Appellee next contends that the constitutionality of section 7137 is not properly before this court because appellant did not affirmatively show that it was not a railroad company or a company engaged in mining coal. This contention is fully answered, we think, in appellants' original brief, pages 17 to 32. *It is significant that appellee does not undertake to answer the contention made in appellants' brief, pages 28 to 32, to the effect that the State Supreme Court, having decided the case on the theory that only that portion of the statute applicable to all corporations was involved and having upheld the same, the jurisdiction of this court cannot be avoided by showing that the case could have been decided upon other grounds.*

Counsel for appellee concede that, in the cases cited by them in support of the rule that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, the records disclosed that the appellants were not within that class. But they contend

that nevertheless the rule announced by the court included all cases where the appellant was not within the class whether the record disclosed that fact or not. But courts act only upon records. *The record does disclose in this case, that appellant is a corporation and that judgment was rendered against it in this case solely by reason of that fact.* It therefore is within the class entitled to challenge the validity of that portion of the statute applicable only to corporations.

Perhaps a great deal of the difference between appellant and appellee upon the question of whether or not the record must affirmatively show that appellant is not a railroad company or engaged in mining coal will disappear when it is once determined whether or not plaintiff's action was based upon the statute, as appellant contends, or was based upon the common law, as appellee contends. His counsel say:

> "Appellee's cause of action was not created by Section 7137 of Crawford & Moses' Digest, his cause of action against appellant is founded upon the ancient doctrine of *respondeat superior.*"

They quote from McKinney, Fellow Servants, paragraph 4, page 4, to the effect that the ancient rule of *respondeat superior* was applied without exception until 1837, when *Priestly* v. *Fowler* was decided and the history of the fellow-servant rule began. They further say that the fellow-servant rule is a part of the doctrine of assumed risk and that assumption of risk is an affirmative defense which is not available to a defendant unless specially pleaded.

It seems immaterial how or when the doctrine of the fellow-servant rule originated. It is sufficient that for almost a century it has been the law of the land, in the ab-

sence of a statute, that the master is not liable for injuries to his servant due to the negligence of a co-employee. Appellee cannot very well rely upon the *ancient* rule of *respondeat superior* for his case was not tried in ancient times. The rule of *respondeat superior* did not apply to the facts as alleged and proved by appellee in this case, and, but for the statute in question, the court undoubtedly would have instructed a verdict for the appellant, as was done in *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532, where the action was against a partnership. The court said:

> "It has been usually held that one of the ordinary risks incident to the employment and one assumed by the servant is the negligence of a fellow servant. But whether based upon that ground or from other reasons the rule of law is well settled that a master is not bound to indemnify one servant for injuries caused by the negligence of a fellow servant. This rule has been modified in this state by the Act of the Legislature of March 8, 1907 (Acts 1907, p. 162), *when applied to a corporation* employing servants, *but this act does not affect this rule when the employers, as in the case at bar, are the individual members of a partnership.*"

In *Kansas City, Ft. S. & M. Ry. Co.* v. *Becker*, 63 Ark. 477, 39 S. W. 358, in an action for personal injuries due to an insecure step upon a railroad engine, the court said:

> "Upon the plaintiff devolved the burden of proving his cause of action. The fireman and engineer were in the common service of the defendant, working together to a common purpose, in the same department, as shown by the evidence. The presumption is they were fellow servants; *and it devolved on the plaintiff to show that they were not, in order to make the defendant liable to him for the damages he suffered from the negligence of the engineer.*"

That case conclusively establishes the rule that the burden is upon the plaintiff, in order to make out a case for personal injuries against an employer, to show that the person whose negligence caused the injuries was not his fellow-servant. In the case at bar, of course, that fact could not be shown because it is alleged by plaintiff that he was injured through the negligence of the defendant Myers who was specifically alleged to be his fellow-servant. He therefore stated no cause of action unless the statute gave him one under the facts alleged.

In 39 C. J. 939, the following rule is stated:

> "On the other hand, where the negligence is charged as that of a servant, *or it appears affirmatively on the face of the pleading that the act or omission causing the injury was that of a fellow servant, or where, under the facts stated, the injury might have resulted from the negligence of a fellow servant, plaintiff must allege, or state facts showing, that he and such servant were not fellow servants,* or that defendant was negligent in employing such servant, or retained him after he knew, or ought to have known, that he was incompetent."

Among the cases cited in support of the text is *Roberts & Shafer Co.* v. *Jones,* 82 Ark. 18, 101 S. W. 165, where it was recognized that if the complaint had shown that the negligence was that of a fellow-servant no cause of action would have been stated. But the court held in that case that the complaint was sufficient, in the absence of a motion to make definite and certain. The complaint alleged that "the defendant, through its foreman in charge of said work, * * *" committed an act of negligence. The court said:

> *"The complaint is defective in that it does not allege that the foreman was a vice principal of the master, and not a fellow servant of the plaintiff;* but it

> should have been met with a motion to require it to be made more definite and certain."

That case is to be distinguished from the one at bar in that negligence on the part of the defendant was charged and it was not alleged that the agent who committed the negligent act was a fellow-servant. It is clear that had the complaint so alleged the court would have said that no cause of action was stated. It was only the fact that it was not shown whether the agent was a vice-principal or a fellow-servant, together with the allegation that the negligent act was that of the defendant, which saved the complaint. In the case at bar no allegation of negligence against appellant was made. It was charged that the negligence was that of Joe H. Myers and that he was a fellow-servant of appellee and that his injuries were caused solely on account of the negligence of Joe H. Myers. (R. 6)

Moreover, treated as a general proposition of assumption of risk, the conclusion will be the same. Conceding that assumption of risk is ordinarily a defense to be pleaded and proved by the defendant, that is not true when the plaintiff's own pleadings or evidence allege or prove facts which show that he assumed the risk. Thus, in *Central Coal & Coke Co.* v. *Burns,* 140 Ark. 147, 215 S. W. 265, it is said:

> "Assumption of risk was an affirmative defense, and the burden of proof was upon the defendant to establish it, *unless it was shown by the plaintiff's own testimony.*"

The same language is used in *Sun Oil Company* v. *Hedge,* 173 Ark. 729, 293 S. W. 9, 13.

It is established, therefore that, unless appellee's complaint was based upon the statute, it utterly failed to state

any cause of action, and his proof failed to establish any liability of appellant. This being established, the cases of *Wiley* v. *Sinkler*, 179 U. S. 58; *Ballard* v. *Hunter*, 204 U. S. 241; *Williams* v. *Walsh*, 222 U. S. 415; and *Hendrick* v. *Maryland*, 235 U. S. 611, cited by appellee on pages 14 and 15 of his brief, are readily distinguishable from the case at bar. The first two cases are affirmative actions by the party attacking the constitutionality of the statutes. Obviously the burden was on the plaintiffs in those cases to show that they were not of the class as to whom the statutes were unconstitutional. In *Hendrick* v. *Maryland, supra*, the appellant was arrested, tried and convicted in Maryland before a justice of the peace for violating the state motor vehicle law in that he operated an automobile over the highway without having procured the certificate of registration required by the law of that state. By that law each owner was required to obtain a certificate and plate, and a non-resident of Maryland who had complied with the laws of the state in which he resided with respect to the registration of motor vehicles was, under specified conditions, permitted to obtain a distinguishing tag and permission to operate his car over the highways for certain periods without paying the ordinary fees for registration and operator's license, but residents of the District of Columbia were not included amongst those to whom the privilege was granted. The appellant contended that the statute was unconstitutional. While it is not quite clear in what respect he challenged the statute, it would seem to be upon the ground that residents of the District of Columbia were discriminated against in that they were not accorded equal privileges with citizens of other states. It was with respect to that contention that the court said:

"The record fails to disclose that Hendrick had

> complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other states under the plain terms of section 140a. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

The fact that defendant was operating upon the highways without a license made a *prima facie* case against him. The burden was therefore upon him to show facts upon which he could challenge the constitutionality of the act. It was, of course, a moot question whether the statute discriminated against residents of the District of Columbia, unless the appellant could show that he had complied with the laws of the District.

In *Williams* v. *Walsh,* the defendant was convicted of selling black powder not in an original package of 12½ pounds, securely sealed, in violation of the statutes of Kansas and was fined $50.00. He filed a petition for a writ of *habeas corpus* in the Supreme Court of Kansas, alleging the illegality of his conviction and the unconstitutionality of the statute as being in conflict with the Fourteenth Amendment to the Federal Constitution and with the Commerce Clause. The Kansas Supreme Court held that the question of whether or not the statute violated the Commerce Clause of the Federal Constitution could not be determined inasmuch as the fact of importation of the package from Missouri did not appear in the trial before the justice. The selling of powder in the State of Kansas otherwise than as pro-

vided by the statute was *prima facie* a violation of the statute. If the sale was in interstate commerce, obviously the burden was upon the accused to show that fact, and, having failed to show it, he was in no position to challenge the validity of the statute as being in violation of the Commerce Clause of the Constitution.

Appellee contends that the record fails to show that the alleged unconstitutional feature of the statute injures appellant. The argument is that the statute could have been made to apply to individuals as well as corporations and, in such case, appellant would still have been liable in this case, and therefore the unconstitutional feature of the statute does not injure appellant. That could be said of every case that has been decided on the equal protection of the law clause of the Fourteenth Amendment. It could have been said of all the decisions of this court cited in appellants' brief, pages 46 to 52. For instance, in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, the appellant would have had to pay an equal amount of taxes had the statute been applicable to individuals as well as to corporations. It is the inequality under the law that renders the statute void.

It was not necessary for appellant to show that there were individuals engaged in the oil and gas business competing with it and that by reason of the burden placed upon it by the statute its cost of producing oil was greater than the cost to individual operators, as suggested by appellee. The statute is not specifically applicable to any particular class of business; it is applicable to corporations, and it is valid or void as to all corporations and not only as to those who can show that in their particular business they

are in competition with individuals. *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533; *Bedford Quarries Co.* v. *Bough*, 168 Ind. 671. Moreover, this court has judicial knowledge of what everyone knows, namely, that individuals and corporations are engaged in substantially the same businesses, especially in view of section 1700, Crawford & Moses' Digest of the Statutes of Arkansas, authorizing the formation of a corporation "for the purpose of engaging in or carrying on any kind of manufacturing, mechanical, mining, *or other lawful business.*" Whether or not the burden placed upon appellant by this statute was so burdensome as to render its costs of producing oil so high as to make it impossible for appellant to compete with individual operators is not determinative of the question. *It cannot be denied that by the statute in question appellant has been deprived of its property to the extent of $30,000, and, even though it may still be able to compete with individuals in the oil business, it has been injured by the loss of that money.*

It is next suggested by appellee that, inasmuch as prior to the adoption of the statute there was a presumption that a servant received additional compensation to justify the assumption of the risk of the negligence of his fellow-servants, the presumption will be indulged that after the passage of the statute the servant's compensation is fixed at a reduced rate in order to compensate the corporation for assuming the responsibility for the negligent acts of its agents. This is arguing in a circle. If the statute is unconstitutional and void as we contend, then there would, of course, be no presumption that corporations have acted upon the assumption that it is valid and reduced compensation of their employees to compensate the corporations for

the risks imposed by the statute. And, of course, if the statute is valid, no such presumption is necessary.

PART II.

The Merits.

At page 25 of their brief counsel for appellee state that it has been held that statutes abrogating or modifying the fellow-servant rule as to railroad corporations but not as to natural persons operating railroads are valid. The cases cited do not sustain the contention. *Missouri Pac. R. Co.* v. *Mackey,* 127 U. S. 205, and *Chicago, K. & W. Ry. Co.* v. *Pontius,* 157 U. S. 209, dealt with a Kansas statute which applied to every railway *company. Minneapolis & St. L. Ry. Co.* v. *Herrick,* 127 U. S. 210, and *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, dealt with Iowa statutes. The Iowa statute by its terms applied to "every corporation operating a railway," but the Supreme Court of that state construed the statute to include "all corporations *or persons* engaged in operating railroads." *Bucklew* v. *Central Iowa Ry. Co.,* 64 Iowa 603, 21 N. W. 103. This case was cited and quoted with approval by the Kansas Supreme Court in *Missouri Pac. R. Co.* v. *Mackey,* 33 Kan. 298, 6 Pac. 291, 293. *Tullis* v. *Lake Erie & W. Ry. Co.,* 175 U. S. 348, dealt with an Indiana statute which applied to "every railroad or other corporation." But the Supreme Court of Indiana, following *Bucklew* v. *Central Iowa Ry. Co., supra,* construed the statute to include individuals operating railroads. *Pittsburg C. C. & St. Louis Ry. Co.* v. *Lightheiser,* 168 Ind. 438, 78 N. E. 1033; *Pittsburg C. C. & St. Louis Ry. Co.* v. *Montgomery,* 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875.

This answers somewhat the query of Chief Justice WHITFIELD in the case of *Ballard* v. *Mississippi Cotton Oil Company*, 81 Miss. 507, 34 So. 533, with respect to the decision of the Federal Supreme Court in *Tullis* v. *Lake Erie & Western Ry. Co., supra,* where he said, with respect to the contention that, in view of the statute in that case which applied to railroad *corporations* only, the Supreme Court must be assumed to have held that such legislation is valid though applied to corporations owning railroads and not to individuals owning railroads, that it was extremely difficult to make answer for the Supreme Court of the United States. Apparently the learned chief justice had not been advised of the uniform construction of the state courts of the term "railroad corporation."

With respect to the case of *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 584, cited by appellee, it is sufficient to refer to the language of that case that "courts may not declare legislative discrimination invalid, unless *viewed in the light of facts made known or generally assumed,* it is of such character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as a denial of the equal protection of the laws if any state of facts *reasonably* may be conceived to justify it." In order to sustain the statute in question under that language it would be necessary to say that it is *not known* or *generally assumed* that individuals engage in the same businesses as corporations. That, we say, could not "reasonably be conceived." Certainly the Supreme Court, in the numerous cases cited in our original brief, took the view that classifications based

solely upon the character of the employer as to being incorporated or unincorporated were arbitrary.

In *Gulf, Colorado & Sante Fe R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, the court said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

The contention of appellee that facts should be assumed upon which the legislature might justly make a distinction between individual and corporate employers is refuted by a decision of this court on December 16, 1935, in *Coalgate* v. *Harvey,* 80 L. ed., Advance Opinions, page 225, where it was held that a state income tax law excluding from taxable income interest received on money loaned within the state at a rate of interest not exceeding five per cent per annum violates the equal protection clause of the Fourteenth Amendment as making a classification based upon a difference having no apparent substantial or fair relation to the object of the act or the public interest. Mr. Justice SUTHERLAND, in delivering the opinion of the court, said:

> "Upon the face of the statute the classification is based upon a difference having no substantial or fair relation to the object of the act—which, so far as this question is concerned, simply is to secure revenue. *The statute itself suggests no other public purpose which will be served by the exemption.* The language creating the exemption is, '*(a)* Interest received on account of

money loaned within this state, at a rate of interest not exceeding five per cent per annum * * *.' The naked and complete test afforded by the statute is that the money shall be loaned within the state. What is to be done with the money, whether it is to be invested in the state or elsewhere—indeed whether it is to be devoted to any useful purpose—are matters having nothing to do with the imposition of the tax or the exemption therefrom. If the statute had provided that interest on account of money so loaned when invested in property having a situs within the state shall be free from the tax, a different question as to classification might be presented. In that event the actual wealth of the state would be increased, and in addition, and as a consequence, opportunity to obtain additional revenue through taxation would result. But this exempting provision, we repeat, contains neither this qualification nor any other. Its terms are positive and all-inclusive and will be fully satisfied whenever it appears that money has been loaned within the state. *The Supreme Court of Vermont has not read into the statute a qualification that loans shall be deemed to be made within the state only if their proceeds be invested in the state. Obviously this court cannot so read the provision, for that would be to amend and not to construe it.* We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan.

"It is suggested, however, that, aside from anything in the statute, money loaned within the state generally will be invested therein. But there is nothing in the record to indicate that this will result; and for aught this court can know judicially, there is no warrant for saying either that it will or will not result. All we can say is that money so loaned MAY BE invested in Vermont, or MAY BE invested in some other state —for example, in property having a situs in New York

—or may not be invested at all. If there be circumstances which will justify the exemption of any income derived from money loaned within the state while taxing the income from that loaned outside, it is for the state legislature to point them out and limit the exemption accordingly. To import any such circumstances into the present situation is to indulge in pure speculation. Compare *Travis* v. *Yale & T. Mfg. Co.*, 252 U. S. 60, 81, 64 L. ed. 460, 470, 40 S. Ct. 228.

"To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only upon surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose or to anything else beyond the mere fact that the favored loans are effected within the state. In principle, the classification is quite as arbitrary as that dealt with by this court in *Louisville Gas & E. Co.* v. *Coleman, supra* (277 U. S. 38, 39, 72 L. ed. 774, 775, 48 S. Ct. 423). If the exemption had been made to depend upon the TIME when the loan was made, instead of upon the LOCALITY where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not."

We respectfully submit that it would have been much more reasonable for this court to assume that money loaned within the State of Vermont would be invested in that state than to assume that all corporations in the State of Arkansas are engaged in a hazardous business and that

individuals and partnerships are engaged in a non-hazardous business, or that there is any other difference in the businesses conducted by corporations from those of individuals which would justify abrogating the fellow-servant ~~rule~~ as to corporations and not as to individuals and partnerships. Not only would such an assumption rest upon surmise, but it would be an assumption of facts which there is every reason for believing are not true, especially in view of the Arkansas statute authorizing corporations to be formed for the purpose of carrying on any lawful business. Section 1700, Crawford & Moses' Digest of the Statutes of Arkansas.

Counsel for appellee have written a treatise on the origin and development of the fellow-servant rule, particularly with reference to non-delegable duties, superior servants, separate departments, and vice-principals, as established by the decisions of the Supreme Court of Arkansas. It is contended that, under the decisions as established by that court, there were certain inequalities in the application of the fellow-servant doctrine to individual and corporate employers, by reason of which there was just ground for the legislature to abolish the rule as to corporations and leave it in force as to individuals. The decisions cited, however, do not appear to make any distinction between individual and corporate employers. The rules laid down are with respect to the law of master and servant without distinguishing between individual and corporate masters. It is contended that, under the decisions of the Supreme Court of Arkansas, a corporation, prior to the adoption of the statute, was liable for injuries to an employee only when the injury was the result of the breach of some personal,

positive and non-delegable duty, whereas, an individual employer was liable for any order or act of his own, whether with respect to some non-delegable duty or a detail of the work. We find nothing in this argument which is not fully and completely answered by the first case ever to be decided in the American courts on the fellow-servant doctrine. *Murray* v. *S. C. R. Co.*, 1 McMullan's Law 385, 36 American Decisions 268. It was there said:

> *"There is nothing in the fact, that the defendant is a corporation, except that of necessity it must act altogether by agents. The liability is precisely the same as if the defendant was an individual acting by the agency of others.* * * *
>
> *"It was said in the argument that if the engineer had been the owner of the road he would have been liable. Of this I apprehend there would have been no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. That he is now liable seems to me to admit of no doubt. But it by no means follows as a consequence that because he is liable those who employ him are liable also."*

Counsel for appellee have not pointed out where there was any inequality in the application of the common law fellow-servant doctrine to individual and corporate employers carrying on business by means of agents. The most that can be said is that a corporation, by reason of the fact that it is a corporation, cannot go out and work with the employees and must necessarily act through agents and employees, whereas an individual employer may at times go out and work with his employees, and, if he is negligent, he will be individually liable. But, as pointed out in the quotation from *Murray* v. *S. C. R. Co., supra,* his liability

is based upon the fact that he did the negligent act rather than the fact that he was the employer of the injured person. Likewise, corporation employees, whether of high or low rank, who do a negligent act causing injury to other employees are personally liable, and thus the employee has no less right when injured through the negligence of another when the negligent person is a manager, officer, or employee of a corporation than when he is an individual employer. Even under appellee's own contention a corporation was liable prior to the adoption of the statute for any injury caused by any employee who was performing a non-delegable duty. Thus, the law was that a corporation would be held liable equally with an individual in such cases as the employer, if an individual, would ordinarily act in person. This is what we understand to be the non-delegable duties of a master. It is clear, therefore, that the law of Arkansas prior to the adoption of the statute was that an individual and a corporate employer were upon equal footing so far as their liability to employees for injuries through the acts of other employees was concerned. True, individuals could make themeslves liable for acts where a corporation could not by going out and working with the employee and personally committing a negligent act. But the fellow-servant law applies only to employers conducting a business by means of employees. So long as the individual conducted his business by means of employees his liability for injuries was precisely that of corporate employers. There was therefore no inequality in the law justifying any modification as to corporations.

Moreover, if there had been any inequity in the law in the respect contended by counsel for appellee, legislation would have been justified only to the extent of placing the

individual and corporate employers upon an equal footing, which the statute in question does not purport to do. Counsel for appellee contend that once an inequality exists the right to classify exists and the details of the legislation and the exceptions to be made are in the sound discretion of the legislature. We concede that legislation with respect to classification need not be mathematically perfect, but we deny that *any* inequality would justify legislation such as that in question which does not correct the inequality but creates a greater burden upon corporations. The correct rule is that the classification must be based upon a real and substantial difference having a reasonable relation to the subject of the particular legislation. If there were any differences with respect to the liability of individual and corporate employers for the acts of superior servants, vice-principals, etc., legislation correcting those differences would probably not be objectionable, but such differences would not authorize the legislature to abrogate the fellow-servant rule entirely as to corporations, for such legislation would not have a reasonable relation to the objects to be accomplished, but would be purely arbitrary. Moreover, *the inequalities claimed by counsel for appellee have no relation whatever to the facts of this case.* In this case there is no question of superior servants, vice-principals, separate departments, or non-delegable duties. The complaint and the evidence show without any question that the negligence upon which recovery was sought and allowed was that of an ordinary employee engaged in common labor in the same department as appellee, having no superior rank, both being engaged at the time of the accident in the act of carrying a joint of pipe. Counsel have not attempted to point out

that there ever was any inequality in the liability of individual and corporate employers under similar circumstances.

On page 48 of their brief counsel for appellee say that corporations as a class were relieved from all liability except for the breach of a non-delegable duty and that such was not the rule with respect to individual masters. They then quote from 3 Labatt's Master & Servant, Second Edition, page 2396, which deals with the master's liability for his *personal misconduct*. The sentence immediately following that portion of the text quoted reads as follows: "*So also a corporation is liable for the personal negligence of a director.*" The text cites, among other authorities, *Harrison* v. *Detroit, etc., R. Co.*, 79 Mich. 409, 19 A. S. R. 180, 7 L. R. A. 623, 44 N. W. 1034. In the syllabus of that case, as reported in A. S. R., appears the following:

> "Where parties are fellow-servants *while engaged in the business of a natural person, they should be so considered when engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through his negligence another engaged in the same business is injured, and for whose injury the corporation is liable, then, under like circumstances, if it was the business of a natural person, the master should be held liable.*"

This case shows clearly that there is no difference between the liability of an individual and a corporate employer for the negligence of fellow-servants.

The case of *Silver* v. *Silver*, 280 U. S. 117, cited by appellee, is not in point. That case is in line with many others holding that the difference between the business of railroading and other businesses is sufficient to place railroad companies in a separate classification. There is undoubtedly a difference between automobiles and other vehicles which

would justify legislation with respect to gratuitous passengers in automobiles without including gratuitous passengers in other conveyances. Just as the legislature may classify railroading, coal mining, and other hazardous businesses separately with respect to liability of the employer to the employees for personal injuries without including other businesses just as hazardous, but different, so may the legislature classify automobiles without including other vehicles. But our point is that there is *no* difference between a business carried on by an individual and a corporation, and therefore it is not permissible to classify corporations for purposes of liability to their employees. That is basing the liability upon the *character* of the *employer* rather than upon the business transacted. The businesses may be, and in many instances are, identical.

The case of *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, cited by appellee, is not in point. There a statute of Missouri requiring corporate employers to give former employees a service letter was held valid. The statute did not deprive the corporation of anything of value. As stated by this court, it was "but a *regulation* of corporations calling for an application of the familiar precept '*sic utere tuo*', etc., in a matter of general concern." This court said further:

> "No well-considered judgment, much less a formidable body of opinion, worthy to be regarded as supporting the view that a statute which, like the Missouri statute, merely requires employing corporations to furnish a dismissed employee with a certificate setting forth the nature and character of the service rendered, its duration, and for what cause, if any, the employee has left such service, amounts to an interference with freedom of contract *so serious and arbitrary* as properly to be regarded a deprivation of liberty or property with-

out due process of law, within the meaning of the 14th Amendment."

And again:

> "What more reasonable than for the legislature of Missouri to deem that the public interest required it to treat corporations as having, in a peculiar degree, the reputation and well-being of their former employees in their keeping, and to convert what otherwise might be but a legal privilege, or, under prevailing customs, a 'moral duty,' into a legal duty, by requiring, as this statute does, that when an employee has been discharged or has voluntarily left the service, it shall give him, on his request, a letter setting forth the nature and character of his service and its duration, and truly stating what cause, if any, led him to quit such service."

And further:

> "The argument under the 'equal protection' clause is unsubstantial. As we are assured by the opinion of the Supreme Court, the mischiefs to which the statute is directed are peculiarly an outgrowth of existing practices of corporations, and are susceptible of a corrective in their case not so readily applied in the case of individual employers, presumably less systematic in their methods of employment and dismissal."

And again:

> "As has been shown, the Missouri statute interposes no obstacle or interference as to either the making or the termination of contracts of employment, and prescribes neither terms nor conditions. *The Supreme Court of the state, having ample knowledge of the conditions which gave rise to the particular legislation, declares with an authority not to be denied that it was required in order to protect the laboring man from conditions that had arisen out of customs respecting employment and discharge of employees introduced by the corporations themselves.*"

The Arkansas statutes and decisions will be searched in vain for any expression of a condition, custom, or circumstance whereby the legislation in question was peculiarly applicable to corporations. If there was any such condition, it should have been pointed out by the legislature and, if not by the legislature, by the state Supreme Court. *Colgate* v. *Harvey, supra.*

At page 58 of appellee's brief it is suggested that the legislature may have believed that an employee of an individual would report to his employer that a fellow-servant, even his immediate superior, was negligent or incompetent, and that therefore the competent servant exception was a sufficient safeguard; but that it may have found that, in the case of a corporation acting only through agents with the management often far removed from the scene of operations, the employee would be less likely to report the negligence of a fellow-servant, thereby presenting a situation so different that the common law rule did not afford ample protection. The reason given for this suggested difference is that in the case of an individual employer the report of the servant would be more apt to be kept secret than in the case of a report to the servant's superior acting for a corporation, on account of the fact that the servant's superior would ordinarily have no right to hire and fire and his knowledge of a servant's incompetence would not constitute notice to a corporation, so that in order to charge the company with notice the servant would have to report in writing to some officer having the power to hire and fire, thereby making it less likely that the report would be kept secret and the servant protected. Even if these facts existed they would not justify the legislation in question. We

do not understand that it is necessary that a master have actual knowledge of the incompetency of a servant, and we think that notice to the person in charge would certainly bind the corporation. We take it that the rule with respect to negligence of a master in a matter of this kind is the same as negligence of any other kind, and a corporate employer would be held liable for furnishing an incompetent servant where it knew or could have known by the exercise of ordinary care that the servant was incompetent. Counsel have cited no authority holding that actual notice must be given to the employer of the incompetency of a fellow-servant in order to make him liable.

Moreover, the suggestion of what the legislature may have found comes squarely within the "possibilities" condemned by this court in *Colgate* v. *Harvey, supra,* where it said:

> "If the exemption had been made to depend upon the TIME when the loan was made, instead of upon the LOCALITY where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not."

Moreover, it cannot be reasonably assumed that a servant would be in direct contact with an individual employer and that he would not have any personal contact with the managing officers of a corporation. This might be true where the individual employer was operating a small busi-

ness and where the corporation was operating a large one, but the legislation in question makes no such distinction. It applies equally to large individual employers and small corporate employers. It cannot be reasonably assumed that all individual employers employ only a few men and are in personal contact with their employees and that all corporations carry on extensive operations and the managing officers are not in personal contact with employees. The legislature perhaps could have validly abrogated the fellow-servant doctrine as to all employers of a certain number of men, whether the employer was an individual or a corporation, and that would be the proper way to reach the situation complained of by counsel for appellee. They seek to have this court sever the act and hold it valid as to large corporations even though it may be invalid as to small ones.

Nor can it be assumed, as counsel for appellee suggest, that the legislature may have found that corporations in Arkansas were engaged in hazardous businesses and that individual employers were engaged in businesses relatively safe to employees. Section 1700, Crawford & Moses' Digest of the Statutes of Arkansas, authorizes the formation of corporations to engage in any lawful business. Section 1825 authorizes foreign corporations to do business in the state. It would be fantastic to assume that corporations in Arkansas are engaged only in the more hazardous businesses while the individuals are engaged only in those which are relatively safe. That the legislature had no such thought is clearly shown by the statute itself. The statute specifically includes railroad companies and coal mining companies, whether incorporated or not, thus showing that the legis-

lature deemed those businesses particularly hazardous, requiring separate classification, and that they would not be reached by the general classification of corporations. If counsel's theory is correct, the statute would have made no mention of railroad or coal mining companies, but would have applied to corporations only. Certainly the legislature, or the Supreme Court in its decisions, points out no such condition peculiar to that state.

We have never contended that the act in question was void as to foreign corporations only. We have contended that it is void as to all corporations, both foreign and domestic. We have merely pointed out that the reasoning of the Arkansas Supreme Court in upholding the act on the theory of the reserve power in the state to amend corporate charters is not applicable to foreign corporations. We have pointed out in our original brief that a state has no greater power under the reserved right to amend corporate charters than it has under the police powers of the state. We contend that the act is invalid as to all coporations, both domestic and foreign.

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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